

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

GU MARKETS, LLC	:	
	:	
v.	:	Civil No. 1:01-CV-288
	:	
SUPERMARKET EQUIPMENT	:	
RESALE, INC., and	:	
TOMMY BREEDLOVE	:	
	:	

---

RULING ON PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE AND  
DEFENDANTS' MOTION FOR A CONTINUANCE  
(Papers 131 & 132)

Plaintiff, GU Markets, LLC ("GU Markets"), has moved in limine to exclude certain testimony of Donna Herndon, an employee of Defendant Supermarket Equipment Resale, Inc. ("SER"), as a sanction for failing to supplement her deposition testimony, pursuant to Fed. R. Civ. P. 26(e).

In this lawsuit, GU Markets alleges, in part, that Defendants converted certain of GU Markets' furniture, fixtures and equipment ("FF&E"). GU Markets hired Defendants to conduct on-site auctions of FF&E from a number of Grand Union stores. Through discovery, GU Markets has identified bills of lading that appear to reflect shipments of FF&E from Grand Union stores to SER's warehouses. GU Markets also identified an Inventory Valuation Report purporting to list inventory in SER's warehouses that came from Grand Union stores.

Defendants, through Donna Herndon as their designee, initially stated the shipments from Grand Union to SER were shipments of "junk." Additional discovery, however, revealed that certain of the shipments appeared to be from stores as to which Defendants had a right to abandon. Herndon evidently agreed that SER would not have paid to ship junk from stores where it had a right to abandon, but stated it was impossible to verify the source of SER's relevant inventory.

For example, during her deposition, the following exchange occurred:

Q. Where did that equipment come from?  
A. I don't know.  
Q. How do we know it didn't come from one of the Grand Union stores?  
A. I don't know.  
Q. There's no way of know that is there?  
. . .  
A. From this; no.  
Q. Is there any other way we could find that out?  
A. From finding the top of it [presumably, the inventory list], possibly.  
Q. What would the top of it tell us?  
A. I don't know.  
Q. Can you think of any other way we could determine where that equipment came from?  
A. When it came in, they could ask Tony Cooper.  
Q. And if Tony Cooper doesn't remember, is there any other way of finding out?  
A. No. (Herndon depo. at 59).

GU Markets was told repeatedly, during this and several other depositions, there was no way to verify the source of the

equipment listed in SER's inventory as having come from Grand Union.

On June 9, 2003, less than 10 days before trial was scheduled to begin, GU Markets received a correspondence from Defendants stating, "In preparing for trial, Ms. Herndon has recently reviewed her deposition testimony, exhibits, and company records. Although her deposition testimony was not incorrect at the time, as a result of her subsequent research she was able to determine the source of the 'warehouse' items and the reason for the shipment to the warehouse from stores where there was a right to abandon." This correspondence attached several hundred pages of previously disclosed documents but newly annotated by Herndon. Defendants now intend to elicit testimony from Herndon at trial that none of the FF&E in SER's warehouses came from Grand Union. GU Markets has moved to exclude this testimony, arguing the eleventh-hour disclosure of work Herndon had previously testified would be impossible to undertake is untimely and unduly prejudicial.

Fed. R. Civ. P. 26(e)(2) provides that "A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect." There can be no

doubt in this case that Defendants failed in their obligations.

At least eight weeks before trial, GU Markets provided Defendants with an annotated inventory list setting forth the specific FF&E it was alleging Defendants had converted. Defense counsel forwarded the inventory list to Herndon for her review, presumably so she could assist counsel in formulating a response at trial. It is certain that defense counsel was aware of Herndon's work before it was turned over to GU Markets. In short, defense counsel knew Herndon was performing an analysis she had previously represented, under oath, could not be performed.<sup>1</sup>

Even more importantly, the origin of the allegedly converted FF&E has always been a subject of this litigation. It is inexplicable to the Court what defense Defendants intended to present in the absence of Herndon's new testimony. According to Defendants, excluding Herndon's testimony now is tantamount to a judgment in favor of GU Markets on its conversion claim. If Defendants are to be believed, they had no defense to the conversion claim prior to the completion of Herndon's analysis, merely one week before trial. Given the

---

<sup>1</sup> Defendants dispute this characterization of her prior testimony. Upon review of the deposition excerpts provided by the parties, Herndon plainly testified that she had no way of identifying the source of the items in the SER inventory and did not know how to obtain that information.

legal resources already devoted to this case, it is far more likely that Defendants were aware of the possibility of identifying the source of SER's inventory, but simply did not undertake the analysis until the eve of trial.

Fed. R. Civ. P. 37(c) sets forth the sanctions for violations of Fed. R. Civ. P. 26(e), providing, in relevant part:

A party that without substantial justification fails to . . . amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include . . . informing the jury of the failure to make the disclosure.

Exclusion is an extreme sanction. In weighing whether to exclude evidence under Rule 37(c), the Court should consider "the importance of the testimony to the case, the prejudice to the party inconvenienced, and the administrative difficulty which the court itself would face." Outley v. City of New York, 837 F.2d 587, 590 (2d Cir. 1988); see also Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597-98 (4<sup>th</sup> Cir. 2003) (identifying factors including bad faith; prejudice; need for deterrence; availability of less

drastic sanction).

The importance of Herndon's new, proposed testimony is undoubtedly central to the case and critical to the Defendants. Its use at trial now, however, would severely prejudice GU Markets because of the volume of material involved in Herndon's analysis, as well as Defendants' own admission that her analysis reflects over 40 hours of work. It is unreasonable to expect GU Markets to prepare for effective cross-examination without adequate time to study Herndon's analysis.

The Court has another remedy available minimize the prejudice of Defendants' last-minute disclosure. During argument in chambers on the present motion, Defendants offered to compensate Plaintiff's counsel for his time and expenses in re-deposing Herndon. This, combined with a continuance of 60 days, best serves the interests of the justice. While GU Markets has objected to any continuance, arguing instead for the exclusion of Herndon's testimony, a 60-delay will impose only minimal costs on the parties and will permit GU Markets to analyze Herndon's new work. Moreover, the Court is willing to consider, on motion by GU Markets at trial, whether to inform the jury of the Defendants' failure to make a timely disclosure.

For the reasons set forth above, Plaintiff's Motion In

Limine is DENIED. Trial is CONTINUED for 60 days. Defendants shall reimburse Plaintiff for all reasonable attorneys' fees and expenses associated with re-deposing Donna Herndon, including time and expenses associated with preparing for the deposition.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this  
\_\_\_\_\_ day of June, 2003.

---

J. Garvan Murtha  
United States District Judge